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city tended to show that when the workmen left the sewer trench it was properly barricaded and lighted and that both barricades and lights were in place next morning, while plaintiff's evidence tended to show that when the accident occurred no lights or barriers were there, the jury might infer that the lights and barriers were removed without the knowledge of the city. Hence an instruction defining the liability of a city if the lights and barriers had been so removed was not objectionable as assuming a state of facts of which there was no evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 822.\* 7 Va.-W. Va. Enc. Dig. 730.]

**2. New Trial (§ 104\*)—Newly Discovered Evidence—Cumulative Evidence.**—Evidence which is merely cumulative of uncontradicted evidence is not ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\* 10 Va.-W. Va. Enc. Dig. 449.]

**3. New Trial (§ 100\*)—Newly Discovered Evidence—Competency.**—Newly discovered evidence, which is merely an expression of an opinion, is not ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 215-217; Dec. Dig. § 100.\* 10 Va.-W. Va. Enc. Dig. 447.]

**4. New Trial (§ 104\*)—Newly Discovered Evidence—Corroborative.**—Newly discovered evidence merely cumulative and corroborative of testimony at the trial is not ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 218-220, 228; Dec. Dig. § 104.\* 10 Va.-W. Va. Enc. Dig. 449.]

**5. New Trial (§ 100\*)—Newly Discovered Evidence—Materiality.**—Newly discovered immaterial evidence is not ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 215-217; Dec. Dig. § 100.\* 10 Va.-W. Va. Enc. Dig. 449.]

**6. New Trial (§ 102\*)—Newly Discovered Evidence—Diligence.**—Newly discovered evidence, which could have been procured if diligence had been used, is not ground for a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 210-214; Dec. Dig. § 102.\* 10 Va.-W. Va. Enc. Dig. 448.]

# COLUMBIA AMUSEMENT CO. et al. v. PINE BEACH INV. CORPORATION.

March 11, 1909.

[63 S. E. 1002.]

**1. Appeal and Error (§§ 362, 758\*)—Petition for Writ of Error—Specifying Error—Necessity.**—Where neither the petition nor brief of

\*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

a plaintiff in error points out in what respect the instruction to which error is assigned is erroneous, the assignment will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1960, 3093; Dec. Dig. §§ 362, 758.\* 1 Va.-W. Va. Enc. Dig. 503.]

**2. Injunction (§ 239\*)—Bond—Extent of Liability.**—A lessor was enjoined from using the leased premises for the sale of liquor on the giving of an injunction bond conditioned to pay all damages. The lease provided that the lessee should use the premises for no other purpose than the sale of liquor. Held, that the obligor in the injunction bond on dissolution of the injunction was liable to the lessor for the rent of the leased premises during the time the injunction was in force, since under the terms of the lease the lessee could not be held liable for the rent.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 542; Dec. Dig. § 239.\* 7 Va.-W. Va. Enc. Dig. 623, et seq.]

**3. Injunction (§ 239\*)—Bonds—Life of Bond.**—Where an injunction bond is conditioned to pay all costs awarded against the plaintiff and all such damages incurred, in case the injunction is dissolved, the bond is in force until the case is finally disposed of on appeal, though the injunction was made permanent in the lower court, and then reversed on appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 542; Dec. Dig. § 239.\* 7 Va.-W. Va. Enc. Dig. 623, 627.]

**4. Injunction (§ 148\*)—Bonds—Validity.**—Under Code 1904, § 3442, providing that an injunction, except in specified cases, shall not take effect until bond be given conditioned as to the court shall seem just and proper, a bond is not invalid in that the judge ordered that the bond be conditioned according to law, where this is the general practice, and the case was not one calling for special conditions.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 328; Dec. Dig. § 148.\* 7 Va.-W. Va. Enc. Dig. 621, 622.]

**5. Injunction (§ 148\*)—Bonds—Validity.**—Where a plaintiff gives a bond to secure an injunction and then acts upon the injunction, he is estopped to deny that the bond is valid, in that the condition therein is not prescribed by the court as is provided by Code, § 3442.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 334; Dec. Dig. § 148.\* 7 Va.-W. Va. Enc. Dig. 622, 626.]

**6. Appeal and Error (§ 1151\*)—Correcting Judgment—Record.**—To justify the appellate court in correcting the amount of recovery claimed to be excessive, the record must clearly establish the claim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4498; Dec. Dig. § 1151.\* 1 Va.-W. Va. Enc. Dig. 606.]

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\*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.